

To: Joint Justice and Public Safety Appropriations Chairs
From: Justice and Public Safety Bill Drafters
Date: October 16, 2015
Re: Permissibility of Recent Reorganizations of the Department of Public Safety

The purpose of this memorandum is to analyze the legality of several recent reorganizations of the Department of Public Safety. The specific reorganizations examined include the combination of the Divisions of Adult Correction and Juvenile Justice into a single Division of Adult Correction and Juvenile Justice in 2013 and the organizational changes set forth in a memorandum from the Secretary of Public Safety dated October 14, 2015. The conclusion ultimately reached is that portions of the reorganizations may violate the North Carolina Constitution and General Statutes.

Factual Background

Combination of Two Divisions into a New Division

The 2013 Appropriations Act¹ amended the statute that sets forth the powers and duties of the Division of Juvenile Justice² to allow the Secretary of the Department of Public Safety to delegate those powers to any deputy secretary, commissioner, or director within the Department. Roughly six weeks later, the Department of Public Safety announced in a press release³ that it was combining the Divisions of Adult Correction and Juvenile Justice to create a new Division of Adult Correction and Juvenile Justice.⁴ That release went on to point readers to the availability online of the resulting new DPS organizational chart.

Various Organizational Changes Set Forth in the October 2015 Memorandum

In a memo issued on October 14, 2015,⁵ the Secretary of the Department announced additional changes to the administrative structure of the Department. These included 23 statements about which officials the various components of the Department were to report to in the future. The memorandum referred to these changes as changes "to the organizational structure" of the Department.

Legal Background

Constitutional Framework

In the Article of the North Carolina Constitution that sets forth the powers and duties of the Executive Branch, the Constitution makes clear that it is the General Assembly, not the Governor or any other member of the Executive Branch, that has final control over the

¹ Section 16D.7(b) of S.L. 2013-360.

² G.S. 143B-806.

³ Available at <https://www.ncdps.gov/NewsRelease.cfm?id=1593&pny=2013>

⁴ *Id.* ("As part of continuing consolidation efforts, the Department of Public Safety is integrating Juvenile Justice and Adult Correction to establish the new Division of Adult Correction and Juvenile Justice.")

⁵ [http://www.wral.com/asset/news/state/nccapitol/2015/10/14/14969667/209132-](http://www.wral.com/asset/news/state/nccapitol/2015/10/14/14969667/209132-DPS_Organizational_Changes_Memorandum.pdf)

[DPS_Organizational_Changes_Memorandum.pdf](http://www.wral.com/asset/news/state/nccapitol/2015/10/14/14969667/209132-DPS_Organizational_Changes_Memorandum.pdf)

administrative organization of State government. Specifically, Article III § 5(10) provides as follows:

(10) Administrative reorganization. The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly.

This language makes clear that while the Executive Branch has the power to reorganize a State agency: (i) it is the Governor who has that power, not departmental secretaries; (ii) if such a reorganization affects existing law, it must be set forth in an executive order submitted to the General Assembly; and (iii) the earliest it can take effect is upon adjournment of the General Assembly sine die.

Past gubernatorial action has acknowledged the limitations imposed by this constitutional language. For example, when Governor Perdue sought to create a new Department of Public Safety the first step she took was to submit an executive order⁶ to the General Assembly setting forth the desired organizational changes. The statutes that govern the organization of State agencies acknowledge the limitations imposed by this language as well. Specifically, several of those statutes include language providing that when any action related to the reorganization of a department that affects existing law is undertaken, "the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed."⁷ Even where statutes do not expressly acknowledge applicable constitutional limitations, those limitations nonetheless control.

Relevant Provisions of the State Budget Act

The State Budget Act provides that "all expenditures of State funds by a State agency shall be made in compliance with the State budget as enacted by the General Assembly and certified by the Director." Potential consequences for violations include referral of the matter to the Attorney General, withholding of future allocations of funds to the offending agency, and criminal liability resulting in forfeiture of the offender's office.⁸

Legal Analysis

Combination of Two Divisions into a New Division

While the changes to G.S. 143B-806 enacted in 2013 authorized the Secretary of Public Safety to delegate the powers and duties of the Division of Juvenile Justice to other deputy secretaries, commissioners, or directors within the Department, they did not confer authority to eliminate the Division or to combine it with another division. To the contrary, they left in place

⁶ Available at https://www.ncdps.gov/cit/executiveorders/EO85_ConsolidationReorganization.pdf

⁷ See e.g., G.S. §§ 143B-10 and 143B-12.

⁸ See e.g., G.S. §§ 143C-6-7 and 143C-10-1.

the statutes that establish both the Division of Juvenile Justice⁹ and the Division of Adult Correction,¹⁰ as well as the more than 200 references to those divisions that exist throughout the General Statutes.

Accordingly, any elimination of the Division of Juvenile Justice or its reorganization into a new division constitutes a reorganization that "affects existing law" within the meaning of Article III § 5(10) of the Constitution and it must satisfy the requirements of that section in order to be valid. In this case, none of the constitutional requirements have been met. First, the constitution requires that the Governor do the reorganizing, whereas in this case it was the Secretary of Public Safety. Secondly, the constitution requires that the reorganization be set forth in an executive order submitted to the General Assembly and no such submission has been made. And finally, even if the first two requirements had been satisfied, the constitution would have prohibited the changes from taking effect until the General Assembly had adjourned sine die or acted on the changes set forth in the executive order.

For the forgoing reasons, we believe that the combination of the Divisions of Adult Correction and Juvenile Justice into a Division of Adult Correction and Juvenile Justice violates Article III § 5(10) of the North Carolina constitution.

Various Organizational Changes Set Forth in the October 2015 Memorandum

The legality of the organizational changes set forth in the October memorandum issued by the Secretary of Public Safety can be analyzed in the same way that the combination of the two existing divisions into a new division was: if any of the changes affect existing law, then in order to be valid they must comply with the process set forth in Article III § 5(10) of the North Carolina Constitution.

After an initial review, it appears that one of the changes set forth in the October memorandum affects existing law. Specifically, the memorandum's requirement that the Director of Samarcand Training Facility report to the Commissioner of Adult Correction and Juvenile Justice appears to conflict with language in the 2015 Appropriation Act that placed that program in the Office of the Secretary:

SECTION 16A.4. The former juvenile detention facility known as Samarkand Manor, located in Moore County, is redesignated a law enforcement and corrections training facility and *assigned to the Office of the Secretary of the Department of Public Safety*. The facility shall be renamed Samarcand Training Academy and shall be administered by a Director. The operating budget for Samarcand Training Academy shall be funded by the Department of Public Safety but shall be independent of the operating budget of any Division within the Department and shall be managed and administered by the Director of the Academy *with oversight by the Office of the Secretary of the Department of Public Safety*.¹¹

There are two ways to view the October memorandum's requirement that Samarcand report to the Commission of Adult Correction and Juvenile Justice instead of the Secretary. The first is

⁹ G.S. 143B-800 ("There is hereby created and constituted a division to be known as the "Division of Juvenile Justice of the Department of Public Safety", with the organization, powers, and duties defined in Article 1 of this Chapter, except as modified in this Part.").

¹⁰ G.S. 143B-700 ("There is hereby created and established a division to be known as the Division of Adult Correction of the Department of Public Safety with the organization, powers, and duties hereafter defined in the Executive Organization Act of 1973.").

¹¹ Section 16A.4 of S.L. 2015-241 (emphasis added).

that it can be viewed as a reorganization that affects the existing requirement that the Director of Samarcand report to the Secretary. When viewed this way, the reorganization must satisfy the requirements of Article III § 5(10). Upon brief examination, however, this reorganization suffers from the same constitutional deficiencies that the creation of the Division of Adult Correction and Juvenile Justice did. First, the constitution requires that the Governor do the reorganizing, whereas in this case it was the Secretary of Public Safety. Secondly, the constitution requires that the reorganization be set forth in an executive order submitted to the General Assembly and no such submission has been made. And finally, even if the first two requirements are satisfied at a later date, the constitution prohibits the changes from taking effect until the General Assembly adjourns sine die or acts on the changes set forth in the executive order. The Secretary's memorandum stating that the changes set forth therein are "effective immediately" ignores this limitation.

The second way of viewing the October memorandum's requirement that Samarcand report to the Commission of Adult Correction and Juvenile Justice instead of the Secretary is as a straightforward violation of the budget enacted by the General Assembly, with all of the potential consequences listed above.

Regardless of which view one adheres to, for the forgoing reasons we believe that the October memorandum's requirement that the Director of Samarcand Training Facility report to the Commissioner of Adult Correction and Juvenile Justice violates Article III § 5(10) of the North Carolina Constitution and various State statutes.